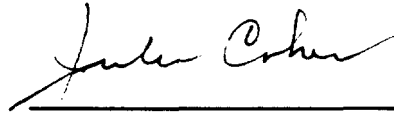


3. The city I have chosen to illustrate the point is Charlotte, North Carolina, because PrimeTime 24 has specifically endorsed Charlotte as a suitable market to illustrate typical trends in markets across the United States. In Charlotte, as discussed in my Expert Report, I arranged for signal intensity tests to be performed at the locations of 101 randomly selected PrimeTime 24 subscribers within the FCC-predicted Grade B contour of WTVD, the CBS affiliate in Charlotte. Of these households, 91 out of 101 were measured to receive a signal of at least Grade B intensity from WBTV, and 99 out of 101 were measured to receive a signal of at least Grade B intensity from either WBTV or another nearby CBS station.

4. I have arranged for Dataworld to create a Longley-Rice propagation map using 97% time and location factors and an assumed 20 foot receiving antenna site, i.e., a map prepared in the manner advocated by Mr. Biby. (The map does not reflect the morphology or vegetation adjustments that Mr. Biby says he has built into his own proprietary program, because I have no way of knowing what those adjustments would be.) When the locations of the 101 tested subscribers in the Charlotte area are plotted on this map, 14 subscribers who were correctly shown to be served by my Longley-Rice map created in the standard FCC manner are incorrectly shown as being unserved by the map done in the way Mr. Biby advocates. That is, by artificially reducing the size of the Longley-Rice Grade B propagation area, Mr. Biby's approach would presumptively permit PrimeTime 24 to serve large numbers of subscribers who clearly can receive a signal of Grade B intensity.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 29, 1998.

  
\_\_\_\_\_  
Jules Cohen

### **Supplemental Declaration of Jules Cohen**

1. My earlier submitted declaration of March 8, 1997 described my qualifications as a licensed professional engineer specializing in broadcast matters. This Supplemental Declaration, submitted pursuant to permission granted by the Court, discusses certain data acquired in 1994 as part of a field test of the digital television system proposed to be used for the new generation of television broadcasting. The field test was conducted in, and in the vicinity of Charlotte, North Carolina. The data were employed by Professor Russell Neuman at the hearing on June 3, 1997. Mr. Neuman alleged that the data from the Charlotte tests supported his contention that there is no relationship between signal strength and picture quality. In fact, the relevant Charlotte data indicate, to the contrary, that signal strength is a good surrogate for picture quality.

#### **The Charlotte Tests**

2. The tests conducted in 1994 were a part of a field test program conducted by the Field Testing Task Force under the Advisory Committee on Advanced Television Service of the Federal Communications Commission. I chaired the Field Testing Task Force, and was the principal author of the test procedures and of the narrative portion of the report dated September 16, 1994 (Defendant's Exhibit 7). The purpose of the testing was to determine the suitability of a system devised to provide over-the-air television broadcasting using digital technology. An important aspect of the testing was a comparison of the digital

transmissions with the analog broadcast system now used in North America and other parts of the world.

3. The Charlotte testing was designed to achieve statistically significant results. That objective was achieved by specifying that the pattern of locations for measurements and observations followed either grid configurations or even intervals along radial lines extending from the transmitter location. Grid configurations were used in two communities. The first community was Charlotte, a city of substantial size (1990 population 314,447) with tall buildings downtown and residential areas with structures of more moderate size. Rock Hill, South Carolina, the second community, provided a medium-sized city (1990 population 35,344). Within each community, an additional "cluster" configuration was used. The cluster was also a grid, but with closer spacing between grid lines than for the primary grid. A third small cluster was located within a few miles of the transmitter to test performance at locations where the vertical plane radiation pattern of the transmitting antenna reduces signal strength. Radials, eight in number, were selected to traverse terrain of different characteristics, ranging from relatively smooth to decidedly irregular. The team conducting the study was required to locate the test vehicle as close to the grid line intersections and to the evenly spaced radial locations as the availability of roads permitted. The sum of locations, including the grid intersections and even spacing along the radials, was approximately two hundred.

4. To carry out the proposed test program, a specially-designed and equipped transmitting plant was constructed. Testing was conducted on both channel 6, a low-band

VHF channel, and on channel 53, a UHF channel. Channel 53 field strength measurements and picture observations were made at all 199 locations. Because of complaints of interference from the channel 6 operation to cable channel 6, measurements and observations on that channel were made at only 169 locations.

5. At each location, the test vehicle, with mast extended to 30 feet above ground, was first used to conduct continuous measurements of field strength in accordance with 47 C.F.R. § 73.686 over a 100-foot path for the purpose of determining the variability of signal strength in the vicinity. The vehicle was then relocated to the center of the run, the antenna was rotated to achieve the best picture, the signal strength was measured at that location, and the picture quality was evaluated by a team of three observers. The picture quality recorded, based on the CCIR five-point rating scale, with intermediate rating points, represented the consensus of the three observers. Picture quality observations were made while looking at the receiver screen while at the site. Although recordings were made, they were strictly for archival purposes. No picture ratings were made based on those recordings.

6. Although median signal strength from the 100-foot runs was available in the Charlotte study, signal strength was also measured at the precise location where picture observations were made. To have meaning, picture quality and signal strength must be for the same location. Since in any 100-foot run signal strength may vary greatly, and the vehicle could be placed at any arbitrary location for the picture observation, the median is not a proper parameter from which to draw conclusions about the relationship between signal quality and assessments of picture quality.

7. The foregoing description of the Charlotte testing is in marked contrast to Mr. Neuman's Pittsburgh study. In Pittsburgh, the locations were not selected in a way that would guarantee representativeness and eliminate bias; approximately half of the observations were made with the antenna directed deliberately in a direction away from the station being observed; the sample size (15) was extremely small; and the picture ratings were made by a single person from a recording. In addition, the engineers in the Pittsburgh study did not collect the relevant data about signal strength -- i.e., data about the specific signal strength at the location at which they made a videotape.

#### The Unsuitability of Placing Reliance on Charlotte Channel 6 Data

8. As pointed out in the report of the 1994 Charlotte study, channel 6 suffered from significant handicaps that make it unusable for relating picture quality to signal strength. To avoid interference to licensed channel 6 operations, the power of the experimental channel 6 station had to be reduced to only one-tenth of that used normally for channel 6 operation. The result of that reduced power was a susceptibility to power line and other man-made noise not experienced by the usual channel 6 operation. An additional handicap was the interference from noncommercial FM stations that operate on frequencies immediately above channel 6. Channel 6 broadcast stations are normally protected from FM interference by the rules of the Federal Communications Commission. Since no regularly licensed channel 6 station exists in Charlotte, however, the normally-existing restrictions on the FM stations were not present. As a consequence, the experimental operation received interference not expected normally, and that interference was further aggravated by reduced transmitting power. The

channel 6 portion of the Charlotte study was useful to compare the performance of digital and analog television. but not as a guide to the relationship between field strength and picture quality.


#### Analysis of Channel 53 Data

9. The Channel 53 picture observations do not present the considerations that make the channel 6 data unsuitable for a picture quality versus signal strength analysis. The relationship of signal strength to picture quality was not an objective of the Charlotte study, but the data are there for such an analysis.

10. According to the Declaration of Richard L. Boyce, a statistical analysis of the data from channel 53 in the Charlotte study shows a very strong likelihood of a positive linear relationship between signal strength and picture quality. Mr. Neuman's contention that the two factors are not related is inconsistent with the facts derived from the channel 53 Charlotte field experiment. It is also inconsistent with my observations during more than four decades as a broadcast engineer.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on June 16, 1997.

  
Jules Cohen, P.E.

# Everyone Watches Television. Some Watch When They Choose.

We have your network TV choice—do you have us? Choose both PT East and PT West for your favorite broadcast network programs on ABC, NBC, CBS and FOX NET, and get twice the TV. When must-watch shows share the same time slot, you can watch them at the same time, and the



# SEPTEMBER SPORTS



## ALL THE FOOTBALL YOU NEED IS ON PRIMETIME 24

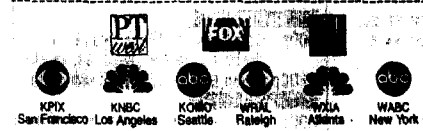
If you love football, you'll get a big kick out of PrimeTime 24's fall schedule. We have enough games and excitement to satisfy even the die-hard fan. Including:

- Over 100 games on PT East, PT West and FOX!
- The only place you can get all 10 playoff games.
- The only place you get SuperBowl XXX!
- Monday night football.
- Thanksgiving Day Games.
- Late-Season Saturday double headers.

Plus your favorite network programming from 7 major cities: movies, drama, comedy and news...with a choice of Eastern *and* Pacific viewing times so you never miss a show. All in a single, complete network package.

PrimeTime 24-Your network *and* football connection. Call one of our packagers or order directly from us:

**1-800-883-PT24**



See all the action  
on S4, G4.

America's Network Connection  
Coast to Coast.

ABC, CBS, NBC, and FOX Channels are available only for homes (1) which cannot receive an acceptable picture from local ABC, CBS, NBC, and FOX affiliates via a conventional rooftop antenna; and (2) have not subscribed to cable television within the last 90 days.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-3650-CIV-NESBITT

CBS INC.; FOX BROADCASTING  
CO.; CBS TELEVISION AFFILIATES  
ASSOCIATION; POST-NEWSWEEK  
STATIONS FLORIDA, INC.; KPAX  
COMMUNICATIONS, INC.; LWVI  
BROADCASTING, INC.; AND RETLAW  
ENTERPRISES, INC.,

**SUPPLEMENTAL ORDER GRANTING  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

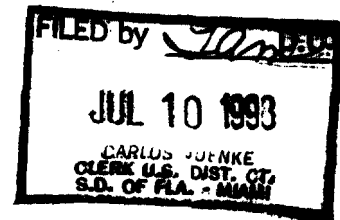
Plaintiffs,

vs.

PRIMETIME 24 JOINT VENTURE,

Defendant.

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This cause comes before the Court upon Plaintiffs'<sup>1</sup> Motion for Preliminary Injunction, filed March 11, 1997. Upon consideration of Plaintiffs' Motion, PrimeTime 24 Joint Venture's ("PrimeTime") Response, Plaintiffs' Reply, the transcript of the hearing before Magistrate Judge Johnson from June 2, 1997 through June 5, 1997, the declarations and exhibits submitted by the parties, the Magistrate's Report and Recommendation, the Objections filed by PrimeTime, the Response thereto, the supplemental briefs filed by the parties and the entire record, and for reasons set forth in the

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<sup>1</sup> CBS Inc., Fox Broadcasting Co., CBS Television Affiliates Association, Post-Newsweek Stations Florida, Inc., KPAX Communications, Inc., LWVI Broadcasting, Inc., and RETLAW Enterprises, Inc. (collectively "Plaintiffs")

Order dated May 13, 1998 and the Sealed Order on Motions for Clarification and Application for Bond dated July 10, 1998, it is hereby,

**ORDERED** and **ADJUDGED** as follows:

1. Plaintiffs' Motion for Preliminary Injunction (D.E. #45) is **GRANTED**.

2. Pending resolution of this matter on the merits, PrimeTime shall not deliver CBS or Fox television network programming to any customer that does not live in an "unserved household" as defined in Section 119(d)(10), or to any business, or to any other customer for other than "private home viewing." Defendant shall also strictly comply with the reporting requirements of 17 U.S.C. § 119(a)(2)(C).

3. To ensure compliance with this Order, PrimeTime shall not:

(a) provide Plaintiffs' network programming to any customer within an area shown on Longley-Rice propagation maps, created using Longley-Rice Version 1.2.2 in the manner specified by the Federal Communications Commission ("FCC"), as receiving a signal of at least grade B intensity of a CBS or Fox primary network station, without first either (i) obtaining the written consent of the CBS or Fox station affiliate or the relevant network, or (ii) after giving 15 business days written advance

notice to the station of its intention to conduct a test and of the time and place at which the test will be conducted, providing the station with a signal strength test at the customer's household showing that the household cannot receive a signal of grade B intensity, conducted in accordance with the procedures outlined in the Declaration of Jules Cohen, filed on March 11, 1997;

(b) provide Plaintiffs' network programming to any business; or

(c) provide plaintiffs' network programming to any customer living in a household at which service is available from a local cable system without first obtaining confirmation that the household has not subscribed to cable in the previous 90 days.

4. Nothing in this Order shall require PrimeTime to terminate service to any existing subscriber who received CBS or Fox programming from PrimeTime as of March 11, 1997.

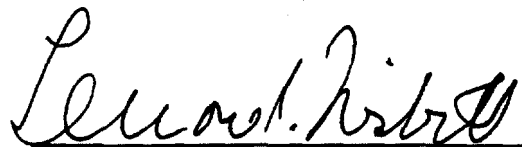
5. With respect to subscribers signed up by PrimeTime from March 11, 1997 to the date of this Order, PrimeTime shall come into compliance with ¶¶2-3 above within 90 days of the date of this Order.

6. PrimeTime shall file and serve on Plaintiffs a status report within 30 days of the date of this Order, setting forth in detail the manner in which PrimeTime is complying with the

injunction. Thereafter, PrimeTime shall file and serve similar status reports containing updated information, on the first day of every other month.

7. Within three (3) days of the date of this Order, Plaintiffs shall post an injunction bond of \$300,000.

**DONE** and **ORDERED** in Chambers, Miami, Florida, this 10 day of July, 1998.



LENORE C. NESBITT  
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

CBS Inc.; Fox Broadcasting Co.;  
Group W/CBS Television Stations  
Partners; CBS Television Affiliates  
Association; Post-Newsweek Stations  
Florida, Inc.; KPAX Communications,  
Inc.; LWWI Broadcasting, Inc.;  
and Retlaw Enterprises, Inc.,

Case No. 96-3650-CIV-NESBITT

Plaintiffs,

v.

PrimeTime 24 Joint Venture,

Defendant.

---

REPORT AND RECOMMENDATION

**THIS CAUSE** is before the Court on plaintiffs' Motion for Preliminary Injunction (D.E. #45). The matter was referred to the undersigned United States Magistrate Judge by the Honorable Lenore C. Nesbitt, United States District Judge for the Southern District of Florida, in an order dated March 18, 1997. The Court received evidence, took testimony, and heard oral argument of counsel during a four-day hearing beginning on June 2, 1997; reviewed the motion and supporting and opposing memoranda of law and the declarations

and other materials submitted therewith; and is otherwise fully advised of the issues involved in plaintiffs' Motion. For the following reasons the undersigned recommends Plaintiffs' Motion for Preliminary Injunction be granted.

### INTRODUCTION

This is a copyright infringement action.<sup>1/</sup> Plaintiffs own exclusive rights in copyrighted network television programs that are retransmitted by defendant PrimeTime 24 Joint Venture ("PrimeTime 24") via satellite to its subscribers nationwide. The principal issue is whether PrimeTime 24's actions are permitted by Section 119 of the Copyright Act (the "Act"), 17 U.S.C. § 119, which provides a limited statutory license to satellite carriers, and by a contractual license from FoxNet, Inc., a subsidiary of plaintiff Fox Broadcasting Company ("Fox"). The licenses in both the Copyright Act and the FoxNet agreement permit PrimeTime 24 to transmit network programming only to "unserved households."

The term "unserved household" is defined in 17 U.S.C. § 119(d)(10), and by reference in the FoxNet agreement, as "a household that --

(A) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity

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<sup>1/</sup> This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 & 1338. Venue in this judicial district is proper under 28 U.S.C. §§ 1391(b) & 1400(a).



(as defined by the Federal Communications Commission) of a primary network station affiliated with that network,<sup>2/</sup> and

(B) has not, within 90 days before the date on which that household subscribes, either initially or on renewal, to receive secondary transmissions by a satellite carrier of a network station affiliated with that network, subscribed to a cable system that provides the signal of a primary network station affiliated with that network."

17 U.S.C. § 119(d)(10). The principal dispute between the parties is over the meaning of the phrase "over-the-air signal of grade B intensity (as defined by the [FCC])" in Section 119(d)(10)(A). Plaintiffs contend that this means a signal of the intensity defined by the FCC as "Grade B," and that it is an objective standard. Although PrimeTime 24 has not offered the Court any definition of the phrase "over-the-air signal of grade B intensity (as defined by the [FCC])," it contends that the statute permits it to rely entirely on subjective statements by subscribers about "acceptable" picture quality in determining whether to provide CBS and Fox network programming to those subscribers.

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<sup>2/</sup> "Grade B intensity" is defined by the FCC in terms of signal strength: 47 dBu for television channels 2-6, 56 dBu for television channels 7-13, and 64 dBu for television channels 14-69. 47 C.F.R. § 73.683(a) (1996). "Grade A" refers to a stronger signal (i.e., with higher dBu levels), usually found closer to the transmission tower.

## BACKGROUND

### A. The Parties

Plaintiffs are the operators of the CBS and Fox television broadcast networks, along with the owners of several individual CBS network stations and a trade association of CBS affiliate stations. CBS, Inc. ("CBS") and Fox own exclusive rights in a wide range of national programming, including such popular programs as "60 Minutes" and "The Simpsons." Kryle Decl. ¶ 4; Taylor Decl. ¶ 3. Each local CBS or Fox network station is licensed by its network to broadcast CBS or Fox network programming in its local market. Kryle Decl. ¶ 4; Taylor Decl. ¶ 3.<sup>3/</sup>

Defendant PrimeTime 24 is a "satellite carrier," as defined in 17 U.S.C. § 119(d). PrimeTime 24 transmits network programming to satellite dish owners nationwide, including in this judicial district. Levi Decl. ¶¶ 4-6.

### B. The Network/Affiliate Relationship

A national television broadcast network, such as those operated by CBS and Fox, provides programming to viewers through a network of local television stations nationwide that broadcast the network's programming to viewers in their local markets. 6/2/97 Tr. at 45 (Farr). The CBS Television

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<sup>3/</sup> The term "network station" is defined in 17 U.S.C. § 119(d) and includes both stations owned and operated by a network and stations owned by third parties.

Network includes more than 200 local CBS stations. Id. at 43. The Fox network includes more than 170 local Fox stations. Taylor Decl. ¶ 2. CBS and Fox (or their sister companies) own some of the stations that are part of their network systems, but most CBS and Fox stations are independently owned affiliates. Kryle Decl. ¶ 2; Taylor Decl. ¶ 2.

The partnership with national broadcast networks enables local network stations to offer the viewing public a unique mix of (1) national programming provided centrally by the networks, (2) local programming, such as news, weather, and public affairs, produced in-house by many local stations, and (3) syndicated programming acquired by local stations from third parties. 6/2/97 Tr. at 49 (Farr). For example, WFOR in Miami combines CBS network programs such as "Murphy Brown" and "60 Minutes" with local Miami news and weather information, including topics of local importance such as hurricane warnings.

This programming is available over the air for free, unlike cable or satellite services, which require substantial payments by the viewer. Id. at 48. The Supreme Court recently emphasized the unique role of local broadcast stations:

Broadcast television is an important source of information to many Americans. Though it is but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression.

Turner Broadcasting Sys., Inc. v. FCC, 117 S. Ct. 1174, 1188 (1997)<sup>4/</sup>

The national networks and their affiliated local stations are interdependent. The networks depend on their local stations to deliver network programming to households nationwide, while the local stations depend on the networks to provide programming on which they can sell advertising. 6/2/97 Tr. at 51 (Farr). Networks and affiliates each promote the programming of the other, and national and local programming can provide substantial "lead-in" and "lead-out" benefits to adjacent programming of the other. Id. at 56-58.

Maximizing viewership is critical to both networks and local stations because their principal source of revenue, advertising, is largely dependent on audience size. 6/2/97 Tr. at 67-68 (Farr). Although local stations also sell time on their other programming, advertising on network programs accounts for up to half of station revenues. Id. at 52-53. If a local network station's network programs are duplicated by a distant network station, the local station loses viewers and, with viewers, advertising revenues. Id. at 68.

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<sup>4/</sup> In Turner Broadcasting, the Court reaffirmed that "'preserving the benefits of free, over-the-air local broadcast television'" is "an important governmental interest." Turner Broadcasting, 117 S. Ct. at 1186 (quoting Turner Broadcasting Sys. v. FCC, 512 U.S. 622, 662 (1994)). Congress has long directed the FCC to foster "localism" in the broadcast industry to ensure that "all communities of appreciable size" have their own voice "as an outlet for local self-expression." United States v. Southwestern Cable Co., 392 U.S. 157, 173-174 (1968).

C. The Limited Exception For Satellite Delivery To "Unserved Households"

Under the Copyright Act, the CBS and Fox television networks are generally entitled to control how and when their programming is made available to the public. In 1988, however, Congress altered that system slightly by crafting the narrow "compulsory license" for satellite carriers in Section 119 that is at the heart of this lawsuit. Under Section 119, satellite carriers are permitted to deliver network stations to satellite dish owners without the copyright owner's permission, but only to "unserved households." 17 U.S.C. § 119(a)(2). By so limiting satellite delivery of network programming, Congress established a system that -- if complied with -- would provide network service to the small number of homes, mostly in rural areas, that cannot receive broadcast signals over the air,<sup>5/</sup> while protecting "the network/affiliate relationship and promot[ing] localism." H.R. Rep. No. 100-887, part 1, at 14 (1988) ("1988 House Report").

Through use of a satellite dish, subscribers can receive many nonbroadcast television networks, such as CNN, ESPN, MTV, USA Network, Nickelodeon, and Lifetime, that are also offered by cable systems. Dish

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<sup>5/</sup> See, e.g., 134 Cong. Rec. 28582 (Oct. 5, 1988) ("The goal of the bill . . . is to place rural households on a more or less equal footing with their urban counterparts.") (remarks of Rep. Kastenmeier).

owners can also receive pay-per-view movies and other channels that may not be available by cable. None of these nonbroadcast services is at issue in this case, and the relief sought by plaintiffs would not affect the ability of dish owners to obtain any of these services.

D. The Business Of PrimeTime 24

PrimeTime 24 transmits CBS and Fox network programming, as well as other network programming, to satellite dish owners throughout the United States. 6/4/97 Tr. at 94 (Amira). PrimeTime 24 does not retransmit the signals of each local network station to its subscribers in that area, but instead offers the same network signals for sale to all its subscribers nationwide. 6/4/97 Tr. at 94-95. Thus, for example, PrimeTime 24's subscribers in Miami do not receive the local Miami CBS station, WFOR-TV (Channel 4), but rather a CBS station from North Carolina and/or California. In this regard, PrimeTime 24's service differs dramatically from cable, which is required to carry local stations. See Turner Broadcasting, 117 S. Ct. 1174 (1997).

PrimeTime 24 has not obtained a license from CBS to retransmit its copyrighted programming. <sup>6/</sup> Kryle Decl. ¶ 6. PrimeTime 24 has obtained a

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<sup>6/</sup> PrimeTime 24 has contractual arrangements with one CBS affiliate (WRAL) and with one NBC affiliate (WNBC) under which the affiliate substitutes national

(continued...)

license from Fox through an agreement with a Fox subsidiary, FoxNet, but that license extends only to "unserved households." Taylor Decl. ¶ 5. Thus, the FoxNet Agreement does not extend PrimeTime 24's right to provide Fox programming beyond that permitted by the Copyright Act.

PrimeTime 24's programming is available to owners of both large ("C-band") and small ("Ku-band") satellite dishes. 6/4/97 Tr. at 95 (Amira). Approximately 50 percent of its subscribers are in the C-band market, and approximately 50 percent are in the Ku-band market. Id. at 112. Although PrimeTime 24 sells directly to owners of C-band dishes, the great majority of its business is conducted through agent distributors, of which DirecTV, a small-dish program packager, is by far the largest seller. Id. at 108, 146. In fact less than one percent of PrimeTime 24's sales are made directly. Id. at 106-108. Approximately 99 percent of PrimeTime 24's sales are made through its distributors. Id. at 106.

PrimeTime 24 currently sells two packages of network programming, PrimeTime East and PrimeTime West, as well as FoxNet, which offers Fox network programs. 6/4/97 Tr. at 151 (Amira). PrimeTime East is a package

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<sup>6/</sup> (...continued)

advertisements for local advertisements in that stations programming as made available to PrimeTime 24 for national distribution, and the resulting advertising revenue is divided. Id. at 103-104; Defs. Exhs.15,16,17.

of ABC, CBS, and NBC programming from network stations located on the East Coast, including WRAL-TV, the CBS affiliate in Raleigh, North Carolina. PrimeTime West is a package of ABC, CBS, and NBC programming from network stations located on the West Coast, including KPIX-TV, the CBS station in San Francisco, California. Pl. Ex. 25. A package combining PrimeTime East, PrimeTime West, and FoxNet retails for five or six dollars per month. 6/4/97 Tr. at 152 (Amira).<sup>27</sup>

There are a variety of reasons, unrelated to being an "unserved household," why a customer might sign up for PrimeTime 24. For example, as PrimeTime 24 highlights in its advertising, viewers with access to additional network stations can watch network programs several hours later (or earlier) by watching a station from a distant time zone and can see sports programs (such as NFL football) that are not available locally. In addition, viewers can use PrimeTime 24 to obtain network programming without the need to install (or to maintain) their over-the-air antennas. See, e.g., Letter from Madonna Ballinger, Attachment A to Thedwall Decl. ("We do not have an antenna, nor do we want to get one.")

#### E. The Rapid Growth Of The Satellite Dish Market And Of PrimeTime 24

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<sup>27</sup> PrimeTime 24 also sells network programming on a station-by-station basis, 6/5/97 Tr. at 20 (Levi), but only a small percentage of PrimeTime 24's subscribers purchase ABC, CBS, Fox, or NBC programming individually.



The satellite dish market is growing at an extraordinary rate. According to the Satellite Broadcasting and Communications Association ("SBCA"), small satellite dishes represent the "fastest growing consumer electronics startup ever," outstripping even the growth pace of such now ubiquitous technologies as CD players and VCRs. Satellite Week, July 15, 1996, available in 1996 WL 7055087. The principal reason for this growth is that consumers today can acquire satellite dishes that are significantly smaller -- and less expensive -- than the dishes available just a few years ago. See, e.g., "Invasion of the Satellite Dishes," Fla. Times-Union, Dec. 2, 1996.

Like the satellite industry generally, PrimeTime 24 is adding new customers at a rapid rate. During 1996, PrimeTime 24 increased its total number of subscribers to PrimeTime East by more than 475,000, or more than 1,000 subscribers per day. PrimeTime 24 expanded its PrimeTime West service even more dramatically, increasing its subscriber base by more than 900,000 subscribers during 1996. See Copyright Office Statements of Account filed by PrimeTime 24 (Ex. 4 to Pl. Mem.).

During the time this lawsuit has been pending, PrimeTime 24 has grown at an even faster pace. PrimeTime 24 now has about 2.5 million subscribers nationwide. 6/4/97 Tr. at 146 (Amira). This represents a net increase of about 500,000 in six months, id., or nearly 3,000 net new